UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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WILLIAM DURLING, et al.,

Plaintiffs,

v. 16 Civ. 3592(CS)

PAPA JOHN'S INT'L INC., Decision

Defendant.

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United States Courthouse
White Plains, N.Y.
March 29, 2017
11:40 a.m.

Before:

THE HONORABLE CATHY SEIBEL,

District Judge

APPEARANCES

FINKELSTEIN BLANKINSHIP FREI-PEARSON & GARBER, LLP
Attorneys for Plaintiffs William Durling, et al.
JEREMIAH FREI-PEARSON

SEYFARTH SHAW, LLP
Attorneys for Defendant Papa John's Int'l, Inc.
GERALD MAATMAN, JR.
BRENDAN SWEENEY
GINA RENEE MERRILL

ALSO PRESENT: Andrew White, Esq.

(In open court)

THE COURT: Have a seat, everyone. Let me make sure I know who is who.

Mr. Frei-Pearson; am I saying it right?

MR. FREI-PEARSON: You absolutely are.

THE COURT: And Mr. White.

MR. WHITE: Yes, your Honor.

MR. FREI-PEARSON: Mr. White is not yet admitted, but with your Honor's indulgence, we respectfully request that he be allowed to sit at the table.

THE COURT: No problem.

MR. FREI-PEARSON: Thank you.

THE COURT: But we would be happy to relieve you of your $200 whenever you are ready to get admitted.

And Mr. Maatman.

MR. MAATMAN: Yes, your Honor.

THE COURT: And Mr. Sweeney.

MS. SWEENEY: Yes, your Honor.

THE COURT: And Ms. Merrill, good morning.

MS. MERRILL: Good morning, your Honor.

THE COURT: We've got a few motions. There's a motion to transfer, there's a motion for conditional class certification, there's a motion for leave to file a sur-reply, and a potential motion to strike.

I think the latter two, I don't need to address

because -- at least not yet.

Is there anything anybody wants to add on the transfer motion that's not been covered by the papers?

MR. FREI-PEARSON: Your Honor, we're happy to rest on the papers, unless your Honor has questions.

MR. MAATMAN: The same would be true for the defense, your Honor.

THE COURT: Apart from the open questions regarding the supplemental declarations and all of that, is there anything anybody wants to add on the motion for conditional certification?

MR. FREI-PEARSON: No, your Honor. Thank you.

THE COURT: All right.

MR. MAATMAN: The same would be true for the defense, your Honor. We'll rest on our papers.

THE COURT: Let me start with the motion to transfer. The defendant Papa John's International, which I'm going to call PJI, would like to transfer venue to Kentucky.

Just by way of background, the named plaintiffs are William Durling, who is a resident of New York, Chris Bellaspica, who is a resident of Pennsylvania, Tom Wolff, who is a resident of New Jersey, Michael Morris, a resident of Delaware, and Richard Sobol, a resident of Kentucky all were delivery drivers in Papa John's pizza stores.

The defendant, PJI, is a Delaware corporation with its

principal place of business in Jeffersontown, Kentucky. The plaintiffs allege that defendant directly or jointly employs 21,500 individuals and operates more than 4600 stores worldwide. There are approximately 3,324 Papa John's pizza locations in the U.S, about 700 of which are owned and operated by PJI or PJI and its partners. The remaining locations are franchised. There's about 2,623 franchise locations, which are run by 786 different franchisors; the number of franchisors being smaller than the number of franchisees because some franchisors run multiple stores.

There are 145 Papa John's locations in New York, New Jersey, Pennsylvania, and Delaware, all of which are owned and operated by franchisees. There are 97 stores in New York, and of those, 30 are within the Southern District of New York. There are approximately 44 locations in Kentucky, all owned by the defendant or, quote/unquote, "corporate stores," that includes the store that employed Plaintiff Sobol in Kentucky, which defendant directly operates. According to plaintiffs' theory, defendant jointly operates the franchises where the other four plaintiffs worked.

Plaintiffs filed the original complaint in this case on May 13 of last year. We had a pre-motion conference on -- let's see. I had a request for a pre-motion conference at the end of June. On July 6, the defendant answered. On July 12, plaintiffs filed an amended complaint. They alleged that they

were paid well below the minimum wage in violation of the Fair Labor Standards Act or FLSA, 29 U.S. Code, Section 201; New York Labor Law, Article 19, Section 650; and the corresponding minimum wage laws of Pennsylvania, New Jersey, and Delaware. Kentucky apparently does not have a minimum wage law.

Plaintiffs allege that all of these statutes require employers to provide employees with sufficient reimbursement for employment-related expenses, so that the employees get the required minimum wage after such expenses are subtracted from the hourly wage.

The plaintiffs, who all delivered pizzas in their own vehicles, allege that defendant systematically under-reimbursed its delivery drivers for vehicular wear and tear, gas, and other driving-related expenses, resulting in the drivers all being paid effectively well below the minimum wage. Plaintiffs further allege that the defendant not only operates its cooperate-owned stores, but is also a joint employer of all of the delivery drivers at the franchised stores, and according to plaintiffs, defendant devised and disseminated the policies and practices that caused drivers at both corporate and franchise stores to be uniformly under-reimbursed. And this is in paragraphs two and three of the amended complaint.

In paragraph 41 of the amended complaint, plaintiffs allege in the alternative that the franchisees acted as agents for the defendant, PJI. They base their claims regarding either

a joint employer or agency, at least in part, on the fact that all Papa John's restaurants, whether owned by defendant or franchised, use PJI's proprietary point-of-sale technology, which I'll call POS technology, to record deliveries made and calculate the number of flat-rate per-delivery reimbursements made to drivers.

Plaintiffs allege, by way of example, that the franchisor that employs three of the five named plaintiffs, which was PJPA, they allege that that franchisor paid its delivery drivers $6 an hour, plus $1 per delivery. Using an average of five deliveries per hour, that comes out to $11 an hour, which is what plaintiffs allege is the average hourly wage.

Using the IRS standard mileage reimbursement rate and applying it to an average of 5 miles per delivery, plaintiffs assert that they paid $13.50 each hour in out-of-pocket expenses to work as a delivery driver for defendant, resulting in a net loss of $2.50 an hour. They allege that they should have either been paid the IRS rate or that their employer should have kept records justifying what they were paid, neither of which occurred. And they argue that the $1 per delivery was insufficient to offset their expenses, and as a result, they got paid below minimum wage.

They seek to represent a nationwide putative class of Papa John's pizza delivery drivers. In their reply papers on

the motion for a conditional collective action and certification, they proposed to modify the class in response to arguments made by defendant to include only drivers who were reimbursed on a per-delivery basis who are not part of a pending class or conditional action relating to reimbursement, there being a couple of other cases raising similar issues, at least a couple.

We had a pre-motion conference on July 13. On July 20, defendant filed the motion to transfer venue to the Western District of Kentucky under 28 U.S. Code 1404(a). On July 21 of last year, a case discovery plan and scheduling order was entered, which called for fact discovery to be complete by July 31 of this year and expert discovery by September 25 of this year. On October 14 of last year, plaintiffs filed a motion for conditional certification of an FLSA collective action.

Turning first to the motion to transfer venue, under 1404(a), I can transfer any civil action to any other district or division where it may have been brought, and whether to do so requires a balancing of conveniences, which is left to my sound discretion. *Forjone v. California*, 425 F. App'x 73, 74. The inquiry involves two steps: First, I must establish whether the case could have been filed in the transferee district, and then whether the convenience of the parties and the interest of justice favor transfer. *See Fuji Photo v. Lexar Media*, 415 F.Supp.2d 370, 373 (S.D.N.Y. 2006). "[T]he parties seeking

transfer carries the burden of making out a strong case for transfer." *New York Marine v. Lafarge*, 599 F.3d 102, 114; and must point to clear and convincing evidence on which the court can base its decision. *Lewis-Gursky v. Citigroup*, 2015 WL 8675449, *2 (S.D.N.Y. Dec. 11, 2015).

I may consider a number of factors to assess whether a transfer of venue is appropriate, including (1) the plaintiff's choice of forum; (2) the convenience plaintiff witnesses; (3) the location of relevant documents and relative ease of access to sources of proof; (4) the convenience of the parties; (5) the locus of the operative facts; (6) the availability of process to compel the attendance of unwilling witnesses; and (7) the relative means of parties. That's *New York Marine*, 599 F.3d at 112. While the moving party "bears the burden of clearly establishing that these factors favor transfer," *Citigroup v. City Holding,* 97 F.Supp.2d 549, 561 (S.D.N.Y. 2000), "[d]istrict courts have broad discretion in making determinations of convenience under Section 1404(a), *D.H. Blair v. Gottdiener,* 462 F.3d 95, 106, and "[t]here is no rigid formula for balancing these factors and no single one is determinative," *Indian Harbor Insurance v. NL Environmental*, 2013 WL 1144800, *5 (S.D.N.Y. Mar. 19, 2013). Trial efficiency and the interest of justice are also important factors in a 1404(a) transfer analysis and may be determinative in a given case. *Liberty Mutual v. Fairbanks*, 17 F.Supp.3d 385, 397 (S.D.N.Y. 2014).

Here, there's no dispute that the action could have been brought in the Western District of Kentucky in the first instance, so I will address only the factors regarding whether transfer would be appropriate.

First is plaintiffs' choice of forum. That choice is presumptively entitled to substantial deference. *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 230, but in "class actions, less weight is given to the plaintiff's choice," *Pace v. Quintanilla*, 2013 WL 5405563, at *2 (S.D.N.Y. Sept. 23, 2013). Affording less deference to representative plaintiffs, however, "does not mean that they are deprived of all difference in their choice of forum," *DiRienzo v. Philip Services*, 294 F.3d 21, 28. In addition, Courts have held that a plaintiff's "choice of forum in an FLSA collective action is entitled to more deference than the choice of forum in Rule 23 national class actions." *Koslofsky v. Santaturs*, 2011 WL 10894856, at *2 (S.D.N.Y. Aug. 18, 2011), which collects cases; *see also Flood v. Carson Restaurants*, 94 F.Supp.3d 572, 577 (S.D.N.Y. 2015) where the court said, quote, "[T]he opt-in structure of FLSA collective actions strongly suggests that Congress intended to give plaintiffs considerable control over the bringing of an FLSA action. Thus, a plaintiff's choice of forum in an FLSA collective action is entitled to more deference than the choice of forum in Rule 23 national class actions;" *but see Earley v. BJ's*, 2007 WL 1624757, at *2 (S.D.N.Y. June 4, 2007), a case

involving alleged FLSA and Pennsylvania minimum wage law violations where the court said that the plaintiff's choice of forum is a less significant consideration in a putative class action than in an individual action, although it did not address whether in FLSA collective plaintiff's choice should get more weight than a Rule 23 class of plaintiff action should.

Here, defendant argues in a conclusory fashion that plaintiffs' choice of forum is entitled to little deference because plaintiffs have engaged in forum shopping. Defendant has not pointed to any specific indicia of forum shopping, such as: "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, [or] the plaintiff's popularity or the defendant's unpopularity in the region." That's from *Iragorri v. United Technologies*, 274 F.3d 65, 72.

Courts do give less weight to a plaintiff's choice of forum where it's not the plaintiff's home forum. *Dickerson v. Novartis*, 315 F.R.D. 18, 32 (S.D.N.Y. 2016). Here, however, plaintiff Durling is a resident of New York and worked for defendant in this district, and therefore, I find no evidence of forum shopping. And accordingly, the factor of the plaintiffs' choice of forum weighs in favor of keeping the case here.

The next factor is the convenience of witnesses and the availability of process to compel the attendance of unwilling

witnesses.

Courts typically regard the convenience of witnesses to be the most important factor, with the convenience of nonparty witnesses given more weight than that of party witnesses. *See Mohsen v. Morgan Stanley*, 2013 WL 5312525, at *6 (S.D.N.Y. Sept. 23, 2013); and *Schauder v. International Knife & Saw*, 2003 WL 1961611, at *3 (S.D.N.Y. Apr. 28, 2003). "When weighing this factor the courts must consider the materiality, nature, and quality of each witness, in addition to the mere number of witnesses in each district." *Martignagno v. Merrill Lynch*, 2012 WL 112246, at *5 (S.D.N.Y. Jan. 12, 2012). The transfer analysis also involves consideration of the Court's power to compel attendance of unwilling witnesses, as a district court can only subpoena witnesses in the district, or within 100 miles of it. *Mohsen* at page 6; *see* Fed. R. Civ. P. 45.

"When a party seeks the transfer on account of the convenience of witnesses under Section 1404(a), he must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover." *ESPN v. Quicksilver*, 581 F.Supp.2d 542, 550 (S.D.N.Y. 2008). Defendant has not provided the names of specific witnesses who would be inconvenienced or who the Court would be unable to compel to testify in this district if the case is not transferred. Therefore, defendant has failed to establish that this factor weighs in its favor. *See American Eagle Outfitters v. Tala*

Brothers, 457 F.Supp.2d 474, 478-479 (S.D.N.Y. 2006).

Plaintiffs say they intend to call more witnesses from New York than Kentucky, although they do not provide specifics either. They note that their likely expert is based in White Plains. Plaintiffs argue there will be "more non-party witnesses in New York than Kentucky because, to the extent testimony from third parties may be relevant to defendant's liability for franchisee-operated stores, those third parties are more numerous in New York and surrounding states than in Kentucky, (which has fewer franchisee-operated stores.)"

The defendant notes the vast majority of individuals responsible for maintaining the relevant records and who have knowledge regarding how to capture data and documents from defendant's systems are located in the Western District of Kentucky. In addition, defendants stress that most Papa John's executives currently reside within 100 miles of the Western District of Kentucky, while none reside within 100 miles of the Southern District of New York.

While testimony from witnesses at defendant's corporate headquarters in Kentucky will undoubtedly be important, *see Martignago v. Merrill Lynch*, 2012 WL 112246, at *2 (S.D.N.Y. Jan. 12, 2012), the convenience of such witnesses is not dispositive because the employee of an employer that is involved in litigation is considered available in any venue due to the employer-employee relationship, *see SBAV v. Porter Bancorp*, 2013

WL 3467030, at *8 (S.D.N.Y. July 10, 2013); *Medien Patent v. Warner Bros.*, 749 F.Supp.2d 188, 191 (S.D.N.Y. 2010).

While policies developed in Kentucky may well be critical to plaintiffs' case, how those policies are implemented in the field also seems relevant. Further, because the putative class includes drivers from at least four states, whether the case proceeds here or in Kentucky, some witnesses will likely be inconvenienced. *See Delgado v. Villanueva*, 2013 WL 3009649, at *5 (S.D.N.Y. June 18, 2013). In the absence of evidence, the particular witnesses not employed by defendant will be inconvenienced by litigation in the Southern District of New York. This factor is neutral.

Next is the location of relevant documents and the relative ease of access to sources of proof.

The defendant asserts that the majority of the documents, including defendant's system-wide standards and requirements for franchisees, are created and disseminated out of its corporate headquarters in Kentucky. "[T]he location of documents and records is not a compelling consideration when records are easily portable." *Mohsen*, 2013 WL 5312525, at *6; *see also Morris v. Ernst & Young*, 2012 WL 3964744, at *4 (S.D.N.Y. Sept. 11, 2012) where the Court noted that the location of relevant documents is largely a neutral factor in today's world of faxing, scanning, and e-mailing documents. Even the Court's reference to faxing seems quaint, only five

years later.

The defendant has, quote, "failed to cite specific evidence located [in the potential transferee district] that will be difficult to transfer to New York." *Lewis v. C.R.I.*, 2003 WL 1900859, at *3 (S.D.N.Y. Apr. 17, 2003). And as plaintiffs point out, defendant's counsel has not expressed any geography-related concerns about producing discovery to plaintiffs' counsel in New York. Because defendant hasn't shown a burden on document production absent a transfer, "its assertion that documents are located in the transferee forum is entitled to little weight." *Flood*, 94 F.Supp.3d at 578. Therefore, I conclude this factor is also neutral.

Next is the convenience of the parties.

The starting point in assessing this factor is the residence of the parties or their principal place of business and office locations. *See Royal & Sun v. Nippon Express*, 2016 WL 4523885, at *4 (S.D.N.Y. Aug. 8, 2016); and *Freeman v. Hoffman-LaRoche*, 2007 WL 895282 (S.D.N.Y. Mar. 21, 2007). "[T]he convenience of the parties does not favor transfer when it would merely shift any inconvenience from defendant to plaintiff." *Kiss My Face Corp. v. Bunting*, 2003 WL 22244587, at *3 (S.D.N.Y. Sept. 30, 2003.)

Plaintiff Durling lives in New York, and Bellaspica, Wolff, and Morris respectively live in nearby Pennsylvania, New Jersey, and Delaware. Only Sobol lives in Kentucky on

plaintiffs' side. Defendant has its principal place of business there. "The convenience of the parties is often connected to the convenience of their respective witnesses," *CYI v. Ja-Ru*, 913 F.Supp.2d 16, 25 (S.D.N.Y. 2012), and as noted above, there is no indication that this district would be particularly inconvenient for the parties' witnesses based on the information I have to date.

As plaintiffs note, New York is a major transportation hub and is more easily accessible than Kentucky. Based on the residence of the majority of the named parties, the accessibility of New York, and the lack of information I have regarding potential witnesses as discussed earlier, this factor slightly favors plaintiffs.

Next is the locus of operative facts, which is a primary factor in evaluating a motion to transfer because it helps the Court identify a center of gravity and where it should properly proceed. *Spiciarich*, 2015 WL 4191532, at *6. "[O]perative facts may be found at the locations where employees worked, notwithstanding allegations that a uniform corporate policy caused the FLSA violations." That's *Flood*, 94 F.Supp.3d at 579; *see Bukhari v. Deloitte & Touche*, 2012 WL 5904815, at *5 (S.D.N.Y. Nov. 26, 2012).

Defendant argues that this factor weighs in favor transfer because less than 3 percent of the domestic PJI stores are in New York and less than 1 percent of them are in the

Southern District. These statistics don't persuade me because the defendant has more stores in New York (97) than in Kentucky (44).

While the policies underlying the claims may have been formulated in the Western District of Kentucky, although defendants deny this to be the case, plaintiff Durling resides in and was employed by defendant in New York, where at least one of the claims occurred. The practices of franchise locations in Pennsylvania, New Jersey, and Delaware will also be at issue in whatever court the case is in front of; therefore, this factor is neutral.

Next is the relative means of the parties.

"This factor will not weigh in plaintiffs' favor unless they can show that transfer would impose an undue hardship." That's *Morris* at page 5. "A party arguing for or against transfer because of inadequate means must offer documentation to show the transfer (or lack thereof) would be unduly burdensome to his finances." *Federman Associates v. Paradigm Medical*, 1997 WL 811539, at *4, (S.D.N.Y. Apr. 8, 1997). *See Rosen v. Ritz-Carlton*, 2015 WL 64736, at *4, (S.D.N.Y. Jan. 5, 2015).

Plaintiffs note that defendant is a "publicly-traded company with $1.64 billion in annual sales in 2015" and therefore argues that defendant has vastly more resources than plaintiffs. That is surely true, but that is not the same as plaintiffs being unable to afford to litigate in Kentucky and

they have not provided any individual financial information. Given, however, that they recently worked delivering pizzas, it is a fairly safe bet that most of them are still relatively low-income earners. Thus, this factor somewhat favors plaintiffs, although not as strongly as it would have if plaintiffs had supplied financial documentation.

The next factor is familiarity with governing law. That factor is generally given little weight in federal courts. *Flood* at 580. Both this Court and courts in the Western District of Kentucky are equally familiar with the FLSA. *See Flood* at 580; and *Rindfleisch v. Gentiva*, 752 F.Supp.2d 246, 261 (E.D.N.Y. 2010). Kentucky has no minimum wage laws and the claims of at least some plaintiffs will involve the application of New York law, with which this Court is more familiar than courts in Kentucky. *See Flood* at 580. At the same time, I don't doubt that a Kentucky judge can figure out New York law.

While defendant notes that the franchise agreements it enters into are governed by Kentucky law, there are no claims arising under Kentucky law or any reason to believe that the Court will need to interpret Kentucky franchise law; therefore, I conclude on balance this factor weighs slightly against transfer.

The last factor is trial efficiency and the interest of justice, which is based on the totality of the circumstances and relates primarily to issues of judicial economy. *Dickerson*, 315

F.R.D. at 32. When discovery is at a relatively early stage, it would not be inefficient to transfer. *See Freeplay Music v. Gibson Brands*, 2016 WL 4097804, at *5 (S.D.N.Y. July 18, 2016). Here, depositions have apparently begun, but there are still several more months of fact discovery, so I would characterize it as a midpoint, but even so, I don't think it would be inefficient to transfer midstream.

"Although certainly not decisive, docket conditions or calendar congestion of both transferee and transferor districts is a proper factor." *Indian Harbor Insurance v. Factory Mutual Insurance*, 419 F.Supp.2d 395, 407 (S.D.N.Y. 2005). Defendant notes that this district has a higher caseload than the Western District of Kentucky and argues that that favors transfer. Judicial economy, although relevant, is insufficient on its own to support a transfer motion. *In re Nematron*, 30 F.Supp.2d 397, 407 (S.D.N.Y. 1998), which collects cases. More fundamentally, while this district has many more cases than the Western District of Kentucky, it also has many more judges, and when defendant's counsel examined the 2015 caseload statistics that they cited in their papers, they might well have noticed that the median disposition time for a Southern District of New York case in 2015 was actually shorter than it was in the Western District of Kentucky.

Another factor traditionally considered in deciding whether a transfer is warranted in the interest of justice is

whether related litigation can be consolidated by transfer. *Liberty Mutual v. Fairbanks*, 17 F.Supp.3d at 397; *see also Everlast v. Ringside*, 928 F.Supp.2d 735, 747. Here, while there are similar actions here and there, there doesn't appear to be anything already pending in the Western District of Kentucky that would make it more efficient to have this case proceed there as opposed to here. So, I don't find this factor weighs in favor of transfer.

After analyzing all of the relevant factors and the totality of the circumstances, I find that most either weigh against transfer or are neutral; accordingly, the defendant has not met its burden. And for the reasons stated above, the motion to transfer venue is denied, as I predicted it would be.

I do note that the defendant, as part of the transfer motion, makes much of the fact that if the plaintiffs were to prevail in this case, this would upend the entire basis of franchising. It may be right the plaintiffs' theory does not hold water with respect to franchises and that the defendant's liability, if any, would be limited to its corporate-owned stores, none of which are in New York. If that's where we end up, a renewed motion to transfer might well be appropriate, but for now, it is denied. And the clerk of court needs to terminate the transfer motion, which is number 42.

In connection with whether we have a case that relates only to the corporate stores or to the franchises, I now turn to

the motion for conditional certification of a collective action.

Section 216(b) of the FLSA F.Supp.2d permits, quote, "similarly-situated" employees to maintain collective actions to remedy violations of the statute if such employees "consent in writing." *See Flood*, 2016 WL 354078, at *2. Potential plaintiffs must "opt-in" to participate in an FLSA collective action. The FLSA does not guarantee an initiating plaintiff a right to obtain a court-ordered notice to potential opt-ins; rather, district courts have discretion to implement Section 216(b) by facilitating notice. *See Myers v. Hertz*, 624 F.3d 537, 554.

Myers laid out the two-step process the courts in this circuit use to determine whether to certify a collective action. At the first step, plaintiffs must make a, quote, "modest factual showing" that they and other plaintiffs "together were victims of a common policy or plan that violated the law." That's *Myers* at 555. "If a plaintiff satisfies his 'modest' burden, the court may authorize the plaintiff to send out notices to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiff with respect to the FLSA violation alleged." *Flood* at page 2; *see Myers* at 555. "Although the FLSA itself does not define the term 'similar situated,' courts require that there be a factual nexus between the claims of the named plaintiff or those who have chosen or might potentially choose to opt into the action." *Warman v.*

American National Standards Institute, 193 F.Supp.3d 318, 323 (S.D.N.Y. 2016).

"[C]ourts generally grant conditional certification" because "the determination that the plaintiffs are similarly situated is merely a preliminary one." *Jackson v. Bloomberg*, 298 F.R.D. 152, 158-159 (S.D.N.Y. 2014).

In contrast to certification under Rule of Civil Procedure 23, "[u]nder the FLSA, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees who in turn become parties to the collective action only by filing written consent with the court." *Genesis Healthcare v. Symczyk*, 133 S. Ct. 1523, 1530. "At the second stage, the district court will, on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether [those] who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers* at 555. "The [c]ourt may decertify the collective action if it determines that the opt-in [P]laintiffs are not in fact similarly situated and the opt in [P]laintiffs' claims will be dismissed without prejudice." *Flood* at page 2; *see Myers* at 555.

"The standard for conditionally certifying a collective is a lenient evidentiary standard." *Delaney v. Geisha NYC*, 261

F.R.D. 55, 58 (S.D.N.Y. 2009). "In presenting evidence on the appropriateness of granting collection action status, the plaintiff's burden may be very limited, and require only a modest factual showing, but the burden is not nonexistent and the factual showing, even if modest, must still be based on some substance." *Guillen v. Marshalls*, 750 F.Supp.2d 469, 480 (S.D.N.Y. 2010*); see Meyers* at 555, where the court said that "The modest factual showing cannot be satisfied simply by unsupported assertions..." "[C]onditional certification may be granted on the basis of the complaint and the plaintiff's own affidavits." *Ramos v. Platt*, 2014 WL 3639194, at *2 (S.D.N.Y. July 23, 2014); *see Alves v. Affiliated Home Care*, 2017 WL 511836, at *4, (S.D.N.Y. Feb. 8, 2017); *Khamsiri v. George & Frank's Japanese Noodle Restaurant*, 2012 WL 1981507, at *1, (S.D.N.Y. June 1, 2012). "When there are ambiguities in the papers seeking collective action status, the court must draw all inferences in favor of the plaintiff at the preliminary certification stage." *Jeong Woo Kim v. 511 East Fifth Street, LLC*, 985 F.Supp.2d 439, 446 (S.D.N.Y. 2013).

The defendant argues that because "the parties have conducted significant discovery, the Court should apply a heightened standard in determining whether conditional certification is appropriate." In *Korenblum v. Citigroup*, 195 F.Supp.3d 475, 482 (S.D.N.Y. 2016), the court applied a "modest 'plus'" standard for conditional certification where "discovery

with respect to conditional certification ha[d] been completed." At the time the instant motion was filed in this case, while some discovery had occurred, it was not "significant" and no depositions had been taken. Further, to date, discovery is far from completed. I therefore decline to apply a heightened standard at this stage. *See Amador v. Morgan Stanley*, 2013 WL 494020, at *4 (S.D.N.Y. Feb. 7, 2013), where the court noted "[T]he overwhelming case law in this Circuit clearly holds that a heightened standard is not appropriate during the first stage of the conditional certification process and should only be applied once the entirety of discovery has been completed," not just undertaken.

So, my role at this stage is simply to determine whether the plaintiffs have sufficiently alleged that they and the other employees in the potential collective were victims of a common compensation policy that violated the FLSA. *Jeong Woo Kim* at 446. If plaintiffs sufficiently establish that there is a common policy that violated the FLSA, the defendant could theoretically be liable either because (1) it dictated that payment policy for delivery drivers, (2) it is a joint employer of them, or (3) it is an apparent agent of its franchisees. Defendant denies all of the above, but its arguments on this point are premature.

Whether the defendant is a joint employer or a parent/agent of its franchisees is a merits issue that I will

not evaluate at this stage. *See Watson v. Jimmy John's*, 2015 WL 8521293, at *3 (N.D. Ill. Nov. 30, 2015); *Salomon v. Adderley*, 847 F.Supp.2d 561, 555 (S.D.N.Y. 2012).

For now, I am evaluating whether plaintiffs have sufficiently shown that they, and the members of the proposed collective action, are similarly situated in that they were victims of a common policy or plan that is unlawful under the FLSA. Plaintiffs can do this by demonstrating either that the defendant dictated a payment policy for delivery drivers employed by corporate and franchisee locations, or apart from that, there is a common policy that exists class-wide.

Focusing first on the first possibility, the plaintiffs have offered no evidence that defendant dictated the payment policy for delivery drivers at all Papa John's restaurants, including franchises. The defendant has admitted that all delivery drivers that it directly employs are reimbursed on a per-delivery basis, although defendant has not conceded that the per-delivery rate is so low as to violate the FLSA; but in any event, the defendant has also offered evidence showing that defendant is not involved in how franchisees pay their employees.

The point of sale or POS technology that plaintiffs rely on as evidence of the defendant's control over franchisees driver payment policy shows that Papa John's locations collected data on the number of deliveries being made, but the mere use of

the POS system does not show how, or how much, franchisees paid their delivery drivers, and the mere fact of PJI's presumed ability to access that data via the POS system in no way indicates that defendant dictated a nationwide delivery driver payment policy. Maybe plaintiff will come up with such evidence, but so far it hasn't.

Turning to the second possible way plaintiffs could establish a common practice in this case, "for purposes of determining the viability of a collective for which conditional certification is sought, the relevant practice that binds FLSA plaintiffs together must be the one that is alleged to have violated the statute itself." *See martin v. Sprint*, 2016 WL 30334, at *6 (S.D.N.Y. Jan. 4, 2016). Showing common policies regarding issues unrelated to expense reimbursement, such as wearing similar uniforms, or use of the Papa John's logo, or even the general use of personal vehicles to make deliveries, is not sufficient to demonstrate a common policy with respect to the payment of drivers. *See Martin* at page 6 where the court said that "[T]he fact of a common job description or a uniform training regiment does not, alone, make those persons subject to it 'similarly situated' under the FLSA."

Plaintiffs have shown that there is a policy governing payment of delivery drivers at corporate-owned stores at a rate that results in the drivers receiving less than minimum wage, or at least has made a modest showing to that effect; and that the

same is true as to two franchisees, specifically, the franchisees that employed Durling and PJPA, the franchisees that employed Wolff and Morris, but such evidence is insufficient to infer a nationwide policy.

Oddly, unlike the plaintiffs in *Perrin v. Papa John's*, 09 CV 1135 in the Eastern District of Missouri, whose declarations were attached as Exhibit 1 to Mr. Frei-Pearson's declaration, plaintiffs here do not say in their declarations that the deficit from the insufficient per-delivery fees they received drove their pay below the minimum wage, but assuming that in plaintiffs' favor, all the plaintiffs here have shown is an arguably inadequate corporate policy and an arguably inadequate policy of two franchisees.

The amended complaint and the declarations offered by plaintiffs showing the practices of the corporate-owned stores and two franchisees are not enough for me to infer that the other 780-something franchisees have the same common payment policy with respect to delivery drivers.

Plaintiffs claim in a conclusory fashion that other franchisees had the same policy but have shown no basis of knowledge of anything occurring beyond their own stores or franchisee. *See Guillen*, 750 F.Supp.2d at 477, where a motion for certification was denied where the plaintiff had no personal knowledge about how stores other than those at which he worked operated.

Even taking defendant's declarations into account, they showed that a few more franchisees did not use the IRS rate to reimburse drivers, but there is no evidence that these franchisees do not pay a rate reasonably related to driving and wear and tear costs, or that what they pay is so low that the drivers end up getting less than the minimum wage.

Therefore, in the absence of evidence of any direction from defendant to its franchisees regarding how to pay drivers and how much, and recognizing that the burden that plaintiffs bear at this stage is a modest one, I cannot infer from the policy of two franchisees, that nationwide 780-something other franchisees reimburse delivery drivers on a per-delivery basis that results in compensation below the minimum wage. *See Brickey v. Dolgencorp.*, 272 F.R.D. 344, 348 (W.D.N.Y. 2011), which denied a motion for recertification where although the plaintiffs offered some evidence that certain managers flouted the defendant's policies, the plaintiffs did not show that such activity was widespread or common, or that the managers did so because they were told or encouraged to do so by the defendant.

Martin v. Sprint, 2016 WL 30334 on which defendant relies, and which plaintiffs do not satisfactorily address, is instructive here. Like this case, *Martin* is different from the cases on which plaintiff relies where a common practice likely existed because a sole employer was being sued for FLSA violations. *See, e.g., Alves*, 2017 WL 511836, *1, 4, which

conditionally certified a class of 30 plaintiffs employed by a single employer where the lead plaintiff submitted a declaration swearing that based on her observations and conversations, the other employees performed similar tasks and were not paid overtime.

In *Martin*, "[t]he declarants collectively represent[ed] employees from only six Sprint partners, two of which [we]re subcontractors of one intermediary, and three of which appeared to be subcontractors of one another." That's *Martin* at page 9. The Court noted at page 8 that it was questionable whether such a numerically and geographically limited number of declarations would suffice to permit the inference of a unitary practice across all states.

In addition to the small subset of the likely sizeable number of Sprint Partners nationwide that the declarants wanted to represent, the *Martin* court declined to conditionally certify the class because, as in this case, the "plaintiff had not come forward with any evidence that would situate the decision to implement the wage-and-hour practices of which they complained above the level of the declarant's immediate employers or the intermediary companies with which some of those employers contract." That's *Martin* at page 10.

So, *Martin* is similar to this case in that the plaintiffs all worked for different employers, and it is therefore unlike the cases on which plaintiffs rely. Plaintiffs

rely most heavily on *Ochoa v. McDonald's*, 2016 WL 3648550 (N.D. Cal. July 7, 2016) and *Watson v. Jimmy John's*. Those were both class action cases, but they are not helpful to plaintiff, even on this motion.

Ochoa is distinguishable and inapposite because in that case, all of the plaintiffs worked for the same franchisor. *See Ochoa* at page 1. And there was simply no issue there as to whether there existed a common practice or policy.

Watson is similarly unhelpful. There, the issue was whether assistant managers were exempt managerial employees and the court examined whether assistant managers had similar responsibilities across the class. The plaintiffs in *Watson* supported their motion for a conditional class certification, not only with declarations containing first-hand knowledge from employees spanning 11 locations in seven states, which described nearly identical job duties and responsibilities, and not only with several assistant manager job postings that were also materially identical and supported the inference that there was a common nationwide policy, but plaintiffs also had corporate documentation, including systems, standards, operations, manuals, and trainee materials, that showed that the franchisor dictated the limits of the assistant manager's managerial discretion.

Here, where the issue is the method and rate of payment for delivery drivers, plaintiffs have far less evidence;

specifically, no evidence that defendant dictated or even shaped the relevant payment policy and evidence as to how, and how much, drivers were paid from only two of 786 franchisees.

Plaintiffs have not cited, and I have not found, a case certifying a nationwide class involving hundreds of franchisees or subcontractors where the declarations offered describe the policies of only two franchisees or subcontractors, and there is no evidence that the franchisor or general contractor dictated or encouraged the relevant practice.

If plaintiffs are correct that defendant has, or has access to, information regarding how all franchisees pay their drivers, or if plaintiffs collects it otherwise through discovery, and if plaintiffs' suspicions, either that the practice is dictated from corporate or that all franchisees do it, or a respectable chunk of them do it, once it gets that information, plaintiffs will be better suited to succeed on a renewed motion.

And the converse is true: If further discovery reveals no corporate encouragement of the policy and no reason to believe that it is something that's widespread, then plaintiffs will not be well suited.

Plaintiffs in their reply suggested that I could certify a class of just the corporate delivery drivers. I decline to do so now, in part because it seems like there is such a class already certified in the *Perrin* case, and I'm not

sure of the status of that case, or whether the policies of which the *Perrin* plaintiffs complained continued into the timeframe that would be covered by this case; and also because if I am going to have just a corporate class, I may well transfer the case to Kentucky. *See Korenblum*, 195 F.Supp.3d at 488.

Recognizing the plaintiffs only have to make a modest factual showing that those employed nationwide as delivery drivers by defendant and defendant's franchisees are similarly-situated and that its plausible that they together were victims of a common policy or plan that violated the law, I find that plaintiffs have not met that burden. Accordingly, the motion for conditional collective action certification is denied, although without prejudice to renewal. And the clerk of court needs to terminate the motion 66, as well as 42.

So, we're staying here for the moment, unless plaintiffs really want me to certify a class just of the corporate employees, in which case, I would entertain a renewed motion to transfer.

I won't put anybody on the spot to make any decisions like that right now. And plaintiffs, of course, are free to continue with discovery and see if it can gather more evidence.

I don't mean to suggest that there's any magic formula of the number of franchisees that have to follow a similar policy. All I'm saying now is that two out of 786 isn't going

to fly. Whether the right number is 20 or 200, or whether it's some representative sampling of the largest ones, or a sampling of small, medium and large, I don't know. I'm not going to give an advisory opinion.

All I can say is, now, I'm not persuaded that just because PJPA and one other franchisee they do this, that everybody does this, but that information may well come to you as discovery proceeds.

Is there anything else we should do this morning morning?

(No response)

I think that moots the motion for leave to file a sur-reply, to strike the declarations, and to file supplemental declarations.

Is there anything anyone else wants to discuss at this time?

(No response)

Go forth and continue your discovery with Magistrate Judge McCarthy.

Thank you, all.

(Continued on the following page)

MR. FREI-PEARSON: Thank you, your Honor.

MR. MAATMAN: Thank you, your Honor.

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Certified to be a true and correct

transcript of the stenographic record

to the best of my ability.

Sabrina A. D'Emidio

U.S. District Court
Official Court Reporter